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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 WILLIAM McCAFFREY,

4 Plaintiff,

5 v.

11 CV 1636 (RJS)

6 THE CITY OF NEW YORK, ET AL.,

7 Defendants.

8 -----x  
9 New York, N.Y.  
10 April 17, 2014  
11 10:50 a.m.

12 Before:

13 HON. RICHARD J. SULLIVAN

14 APPEARANCES  
15 GLENN A. GARBER  
16 IRVING COHEN  
17 Attorneys for Plaintiff  
18 NEW YORK CITY LAW DEPARTMENT  
19 Attorneys for Defendants  
20 BY: ARTHUR G. LARKIN, III  
21 VICKI B. ZGODNY  
22  
23  
24  
25

District Judge

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1 (In open court; case called)

2 MR. GARBER: Glenn Garber and Irving Cohen for William  
3 McCaffrey. Good morning.

4 THE COURT: Mr. Garber, Mr. Cohen, good morning. And  
5 this is Mr. McCaffrey here. Good morning Mr. McCaffrey. Just  
6 I'm moving because the giant head of my law clerk is blocking  
7 my view.

8 For the defendants.

9 MR. LARKIN: Good morning. Arthur Larkin. City Law  
10 Department. With me is Vicki Zgodny.

11 MS. ZGODNY: Good morning, your Honor.

12 THE COURT: Good morning, Ms. Zgodny. And Mr. Larkin,  
13 good morning. And I will just state for the record my law  
14 clerk does not have an enormous head. He's got great hair  
15 though. The envy of all who sit behind him.

16 All right. We're here -- I don't mean to make light  
17 too much but we're here for a pretrial conference on this  
18 matter which is headed for trial a week from Monday. So there  
19 are a number of motions in limine which I propose to go  
20 through. There are a number of objections to exhibits which  
21 I'm not sure we're going to have time to go through today in  
22 total. There is also then the voir dire and requested charge,  
23 some of which there are disputes; I think more with the latter  
24 than the former. So what I propose to do is to see how far we  
25 can go today; and if there's a need to then schedule something

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1 for next week, we may need to do that as well.

2                   With respect to the exhibits. I don't have the  
3 exhibits, so it's difficult for me to rule on objections on  
4 exhibits where I don't have them, particularly where the  
5 objections are in many cases just one or two lines or a  
6 reference to a rule number. So I may -- I think I'm probably  
7 going to ask you to send me the exhibits to which there are  
8 objections or maybe all the exhibits just on a disk and then to  
9 elaborate a little bit on the objections, the basis for the  
10 objections, but we'll come back to that.

11                  The first -- I have the motions in limine of the  
12 parties. I have the joint pretrial order and I also have some  
13 letters that followed. So they've all been docketed so I don't  
14 think I need to go through them now. There were some late  
15 editions that came in just yesterday and we'll talk about  
16 those. I was surprised at some of the facts that were revealed  
17 in the late letters.

18                  Let's starts with the motions in limine. The first  
19 motion is a defendants' motion to bifurcate the fair trial  
20 claim. I think that has since been altered in light of the  
21 concession that prejudice does go to the jury.

22                  MR. LARKIN: Yes, your Honor.

23                  THE COURT: So I'm going to deny that motion and I  
24 don't think there's any dispute. It's not really a motion  
25 anymore.

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1                   Next is the defendants' -- I'm going through the  
2 defendants' motions in limine. The defendants make a motion  
3 with respect to whether state of mind is a requirement and  
4 therefore requires evidence to demonstrate deliberate decisions  
5 by the defendants as opposed to more than just simply  
6 negligence. I think that this is correct as a matter of law.  
7 I think that this will go then to jury instructions. But I  
8 think that there has to be a showing of intent and a showing of  
9 more than just simple mistake for the Brady violations. So I  
10 think -- I'm inclined to grant, but I think the devil's in the  
11 details and that's going to turn on what the jury instruction  
12 is going to look like and I will send you my draft of the jury  
13 instructions on that and some other issues about which there  
14 are disputes.

15                   Qualified immunity is obviously an issue for the  
16 Court. I think that there clearly need to be special -- a  
17 special verdict form, special interrogatories that go to the  
18 jury. The devil, again, is in the details on what those look  
19 like I think is the key. I think I'm going to, at the same  
20 time I send to you my draft, my pretty much final draft of the  
21 voir dire and requests to charge I'll also include my version  
22 of the final verdict form. Maybe I'll get some input from you  
23 but that's -- I don't think there's any disagreement that it's  
24 for me to decide qualified immunity. I think the issue is how  
25 do we tee up the factual disputes that need to be resolved that

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1 will be relevant to my determination of qualified immunity.

2 The next is the defendants' motion with respect to  
3 Aurora Pujols and how her testimony should be elicited at  
4 trial. I think for purposes of trial it should at least begin  
5 with nonleading questions. If it turns out during the course  
6 of those questions that she can fairly be considered a hostile  
7 witness, then I think leading questions will be appropriate.  
8 But I think at least initially she's not a party and I think  
9 the witnesses should be -- questions should begin as nonleading  
10 questions. Okay. She can, of course, be impeached along the  
11 way and I expect that there will be a fair amount of that,  
12 depending on what her answers are on direct.

13 MR. GARBER: Just to give you some insight. I'm not  
14 going to have -- or we're not going to have access to her  
15 before she testifies. So certainly we will do what we would do  
16 in a typical direct. But we're not going to be able to prepare  
17 her. Whether or not she then turns hostile is something that  
18 will happen, if it does, right in front of our eyes.

19 THE COURT: She's been deposed.

20 MR. GARBER: Yes.

21 THE COURT: You've had access to her in the past.  
22 Look, I think we're in agreement. You know what you're doing.  
23 And so I think the questioning should begin in a nonleading way  
24 as direct examination ordinarily would. And if her responses  
25 or her demeanor reflect that, okay, we've got to change this

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1 up, then you can ask. And if we need a sidebar, we can talk  
2 about it. But I think it will be pretty obvious to me whether  
3 she has crossed the line into being a hostile witness.

4 MR. GARBER: Very good.

5 THE COURT: Good.

6 There then is also a motion with respect to the audio  
7 recording of Pujols's statements. I think this really is going  
8 to turn on how -- what she says on the stand. So to the extent  
9 that she says things on the stand that are inconsistent with  
10 prior statements, she can be impeached with those prior  
11 statements and I don't -- and perhaps including the recording  
12 itself. I think it really is going to turn on what she says on  
13 the stand. I think it's certainly a good possibility that to  
14 the extent she testifies and says either I never said that or I  
15 said that but I didn't mean it, I mean I think she certainly  
16 can be impeached and I think the recording might then be  
17 admissible because that's going to go to the fundamental issue  
18 for the jury to decide which is which version is true.

19 So, I think -- I'm going to reserve but I think  
20 there's at least a good chance that that's going to come in as  
21 she is impeached on testimony given here in court.

22 Mr. Larkin.

23 MR. LARKIN: I'm sorry, your Honor. Just so that  
24 we're clear.

25 So the Court may allow the recording to be played for

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1 the jury and then the questions will be put to the witness.

2 Was that --

3 THE COURT: No.

4 MR. LARKIN: Was that your voice? Did you make those  
5 statements?

6 THE COURT: The witness is first going to be asked --  
7 well she's going to be asked what --

8 MR. LARKIN: What happened?

9 THE COURT: What happened. What the defendants said  
10 to her and what she said to them. And then I think, depending  
11 on what she answers, she can be crossed: Well, didn't on a  
12 prior occasion you tell Mr. Dwyer or somebody else something  
13 different? And then she has to be confronted with her prior  
14 statement, given a chance to explain or contradict. And I  
15 think the tape itself at that point might, in fact, be very  
16 relevant.

17 MR. LARKIN: I guess if she's asked: Isn't it true --  
18 did you on a prior occasion tell Mr. Dwyer X, Y and Z and she  
19 says: Yes, I did, at that point she's admitted the prior  
20 statement. So I guess it's hard to script all of this in  
21 advance. I'm just trying to play out in my mind how it would  
22 go.

23 THE COURT: Well, if she says that, then my hunch is  
24 that either on cross, I guess you'd be crossing her in a  
25 sense -- you know, if at some point she is trying to explain

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1 why she said it which is: Oh, I was intimidated or I was  
2 harassed, I didn't mean it, but I had to say something to get  
3 this joker off my back, then I think -- this goes to the next  
4 motion in limine -- then I think Mr. Dwyer would be allowed to  
5 testify about whether or not he ever asked her what her  
6 demeanor was, what his demeanor was. And then I think also the  
7 tape, the recording would be relevant because it would show  
8 didn't seem like she was being harassed or, yeah, this guy was  
9 really being difficult, I can understand what she was saying.  
10 So I think under those circumstances it would probably be  
11 coming in. And I think that's probably where we're headed.

12 MR. LARKIN: I understand. Thank you.

13 THE COURT: So I think that gets to the Dwyer point.  
14 So I think he certainly can be called to testify to impeach the  
15 testimony of Pujols particularly on something like whether he  
16 was harassing her. Because that seems like that's what's going  
17 to be the explanation for the prior statement that's  
18 inconsistent with what I expect will be her trial testimony.

19 Related to that, there is a question as to whether the  
20 memorandum that was prepared by plaintiff's counsel and  
21 provided to Mr. Dwyer in advance of the interview should be  
22 turned over and should be fair game for cross. I guess I would  
23 like to see that. Have I teed that up right?

24 MR. LARKIN: Yes, your Honor. That would be my  
25 concern is whether we could use that memorandum to

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1 cross-examine Mr. Dwyer if he testifies.

2 THE COURT: So I guess it's a little premature but I  
3 think, assuming that that's where this goes, and I think that's  
4 not -- I wouldn't bet against it going that way -- it seems to  
5 me it certainly would be relevant to Mr. Dwyer's state of mind  
6 and I think that would be relevant in assessing his  
7 credibility, in assessing Pujols's credibility, and it would  
8 enable the jury or assist the jury in deciding what happened.  
9 So I think it would be relevant. I guess I'd have to see  
10 what's in it to make my determination to weigh -- to engage in  
11 the analysis that I am required to make for something that is  
12 work product. It's not an absolute bar. It obviously can come  
13 in. But there's a standard the Second Circuit has set forth  
14 and I think I need to see it to assess it.

15 MR. GARBER: Sure.

16 I have been trying to find a hard copy of it. But I  
17 think I might have a version on my computer also as to  
18 Mr. Dwyer. So, I have not seen it in a while. It was  
19 something I prepared and gave to him to assist his  
20 investigation. So I will find a version of it. Hopefully I  
21 have the hard copy that I gave him or a version that, you know,  
22 content, and I'll get it to you shortly.

23 MR. LARKIN: I was going to say at the deposition  
24 Mr. Garber had a hard copy and I did request that it be kept.

25 MR. GARBER: So I should have one.

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1                   MR. LARKIN: Specifically for this purpose. So I  
2 would assume that there is a copy somewhere.

3                   THE COURT: I assume it will turn up. So send that to  
4 me, I guess, ASAP. Might as well send it to me now so I can  
5 start looking at it.

6                   You have no objection to that, right, Mr. Garber?

7                   MR. GARBER: No.

8                   THE COURT: The next of the defendants' motions in  
9 limine is with respect to the testimony and report of  
10 Dr. Pearson. I think I've already ruled on that.

11                  MR. LARKIN: Yes.

12                  THE COURT: And then Ms. Salgado and Ms. Muncey. And  
13 I've already ruled on that. So I'm not going to change my  
14 ruling.

15                  Then there is the issue of the Pujols interview which  
16 I think I've now just ruled on. So that's -- I think I've  
17 already discussed that. I already said that there are  
18 certainly circumstances under which it would be coming in.

19                  MR. LARKIN: May I just ask one question, your Honor?

20                  THE COURT: Sure.

21                  MR. LARKIN: Would it be helpful for the court and for  
22 the jury to have a transcript of the interview?

23                  THE COURT: Oh, it couldn't hurt. I assume -- to the  
24 extent she's going to be impeached, I would think that it's --  
25 probably both sides have an interest in having a transcript and

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1 the actual recording handy. And I assume those are going to be  
2 on your exhibit lists, right, those already are on the exhibit  
3 lists.

4 MR. LARKIN: The recording certainly I believe is on  
5 plaintiff's exhibit list. We have a copy. They have a copy.  
6 And I think we submitted the transcript or portions of it as  
7 part of our motions in limine. So I will forward our version  
8 of the transcript which our word processing people created.  
9 And hopefully we can stipulate to it. And we'll have something  
10 we can use. It will make it easy for everybody to read along  
11 if the recording is played.

12 THE COURT: If you've got it, list it, turn it over to  
13 Mr. Garber and Mr. Cohen. And then I'd like a full set of all  
14 of the exhibits by Monday, if I can, just so I've got them all.  
15 Okay?

16 MR. LARKIN: Yes, your Honor.

17 THE COURT: All right. The next --

18 MR. GARBER: Can we change it to Tuesday because -- is  
19 that okay? Is Tuesday okay for all the exhibits just  
20 because --

21 THE COURT: Just because?

22 MR. GARBER: Just because.

23 THE COURT: What's the because?

24 MR. GARBER: We have a lot of work to do and I think  
25 there was one threshold question that was raised in my letter

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1 which is the use of the trial transcripts because that's going  
2 to dictate -- if we can bring a trial transcript --

3 THE COURT: We'll get there.

4 MR. GARBER: It's going to dictate what exhibits we  
5 think we're going to want to use.

6 THE COURT: Well let's come back to the timing, but  
7 I'll want them certainly sooner rather than later.

8 The next motion in limine from the defendants is  
9 whether the plaintiff can -- is I guess the proximate cause  
10 argument. There is an issue in my mind as to what exactly the  
11 plaintiff is going to introduce here. So to the extent there  
12 are individual assaults in prison, I don't think that the  
13 defendants are responsible for the assaults. I think a fact of  
14 prison, and it's sort of a general -- general testimony about  
15 that prison stinks is I think fair game. But individual  
16 incidents of inmates doing brutal things I don't think that  
17 that's -- I don't think that can be attributed to the defendant  
18 and so I think that would be a proximate cause problem and I'm  
19 not going to allow that. Is that where you're planning to go?

20 MR. GARBER: Not exactly.

21 The point of the assault in prison was he went in as a  
22 rapist, which made his row to hoe much harder than a typical  
23 inmate. And he had been targeted by guards and by inmates. He  
24 had been outed by the guards as somebody who had been a rapist.  
25 When he was in the yard essentially he would essentially keep

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1 his back up against the wall and wasn't socializing with other  
2 inmates. He didn't get certain jobs like kitchen duty and so  
3 forth because of his charge. There was ridicule. And there  
4 was an inmate who threw hot water on him. And it's -- his  
5 understanding, it was because he had been outed as a rapist.

6 And so we're not saying that defendants caused that.  
7 But what we are saying is that going in as a rapist, there are  
8 a number of things that go along with that label when you're  
9 incarcerated and this was a byproduct of it.

10 THE COURT: If the defendants didn't cause it, then  
11 why is it relevant and why should it be part of this trial? It  
12 seems to me if you want to sue the guards who outed him and you  
13 want to sue the inmates what assaulted him or the guards who  
14 allowed assaults to happen, that's a fair lawsuit. I see  
15 lawsuits like that all the time.

16 But I'm not sure that -- this is a trial for a Brady  
17 violation. But I don't see why the defendants are responsible  
18 for or should be found responsible for everything that happened  
19 to Mr. McCaffrey while he's in jail or in prison, I should say.

20 MR. GARBER: I think causing someone to be wrongfully  
21 convicted of a rape, okay, and maybe when I say they weren't  
22 the cause, maybe I'm wrong and that's not the right way to  
23 phrase it. I guess they are the cause of him going in as a  
24 rapist and things happening to him because he's a rapist, like  
25 getting hot water thrown on you by an inmate. And I think it

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1 goes to damages and how he suffered in jail. There may be --  
2 maybe there should be a curative charge that there's not an  
3 independent claim that the defendants directed or instructed  
4 anybody to attack him in this manner, but you should have a  
5 clear picture of his incarcerated experience.

6 THE COURT: I think the law is pretty clear. It  
7 requires reasonable foreseeability on the part of the  
8 defendants that their tort would contribute to a later  
9 independent action that would harm the plaintiff. If that's  
10 the case, then the chain of causation is intact. But I think  
11 what you've described in terms of throwing hot water on him, it  
12 seems to me that that's a stretch in terms of the chain of  
13 causation and the reasonable foreseeability. Unless you've got  
14 some evidence that the defendants could or should have  
15 reasonably foreseen this, I don't think you're going to be able  
16 to meet the requirements for causation and I'm going to keep it  
17 out. So is there any evidence that the defendants themselves  
18 understood that this was going to happen?

19 MR. GARBER: I think it's common sense if you're going  
20 in as a rapist you're going to be targeted by other inmates and  
21 you're going to be treated differently than if you went in as  
22 somebody who committed a homicide, for example.

23 I think that's obvious, especially in the criminal  
24 justice world that the bullies live in. I just think that it's  
25 an obvious byproduct of going in as a rapist. What about being

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1 able to establish that he was ridiculed, that he was verbally  
2 abused for being a rapist and how he had to behave to  
3 essentially get through his day. I think that that's certainly  
4 fair game. Because it goes to his damages and what happened to  
5 his brain and his way of living and his emotional state. So, I  
6 would assume that's okay.

7 THE COURT: Well I wouldn't assume anything. I think  
8 the issue is -- I do think causation has to be established. I  
9 don't think there's any dispute on that with respect to the  
10 law. And so I think you have to think about what evidence  
11 there is to establish a causal chain.

12 MR. GARBER: Okay.

13 THE COURT: I think we probably do need to flesh this  
14 out. This is coming in through Mr. McCaffrey, presumably  
15 right?

16 MR. GARBER: He would testify about his past  
17 experience.

18 THE COURT: He's going to be one of the early  
19 witnesses?

20 MR. GARBER: Probably.

21 THE COURT: I think sort of throwing water, hot water,  
22 I think that is -- seems to me to be beyond the chain of  
23 causation that would be reasonably -- could be reasonably  
24 demonstrated here. So I think that's out.

25 So the conditions of being in prison I think -- I

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1 think that's fair game to a certain extent. The jury gets the  
2 fact that being deprived of your liberty and put in jail for a  
3 period of years is pretty bad and harmful. But I don't think  
4 it should turn into a trial about prison conditions because the  
5 defendants here are not responsible for the prison conditions,  
6 don't work as part of the prison system, and I don't think it's  
7 fair or desirable that we then end up having a trial about the  
8 department of corrections.

9                   So a little latitude I think I could give but not much  
10 more than that. So I'd like you to articulate before  
11 Mr. McCaffrey takes the stand just exactly what it is you're  
12 going to ask him and what you're going to elicit from him  
13 about, you know, what he experienced in jail so that we can  
14 have that vetted very closely before the jury hears it.

15                   MR. GARBER: I'll be prepping him this coming week.  
16 So I'll have a clear picture of what that's going to be and I  
17 will heed what you're saying about blaming prison -- going  
18 overboard. I'll heed the warning.

19                   THE COURT: I think we're going to need to come back  
20 next week so you can flesh this out next week or certainly  
21 before Mr. McCaffrey testifies, and I don't want you to open on  
22 any of that stuff if we haven't resolved it. Okay. Good.

23                   The next defense motion is a motion to preclude  
24 evidence of the defendant's disciplinary history or involvement  
25 in other civil rights actions. I mean the fact that they were

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1 named as defendants in civil rights actions, the fact that they  
2 were accused of some wrongdoing that was never substantiated  
3 or, in fact, was disproven or at least a fact finder found that  
4 the conduct was -- didn't occur, it seems to me that this  
5 shouldn't be coming in. So I'm inclined to grant this unless  
6 there's something else I'm missing, Mr. Garber.

7 You just want to elicit from the defendants on cross  
8 that they have previously been named in lawsuits and previously  
9 named in CCRB complaints?

10 I think that that's -- I don't think there's enough  
11 there to justify that. There is no finding of the actual  
12 conduct, and the mere acquisition is not enough. So I'm going  
13 to grant that motion.

14 The next motion is the defendants' motion to permit  
15 the defendants to cross-examine the plaintiff regarding his  
16 prior arrest history and time spent incarcerated.

17 This seems to me to be only relevant if the plaintiff  
18 intends to elaborate on his experience in jail in ways that  
19 seems to have come up at the deposition. So I guess I'm going  
20 to reserve on this one to see exactly what comes out on  
21 Mr. McCaffrey's direct. I think this is all going to be coming  
22 in through Mr. McCaffrey as to his experiences in jail. But if  
23 in essence he says: This is shocking I've never experienced  
24 anything like it, this was the worst experience in my life, I  
25 think that may be opening the door to show well, this was a

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1 second home and not exactly unfamiliar territory for you.

2 Now, I don't think I'm going to allow any discussion  
3 about what he was convicted for. That's a -- we're going to  
4 come back to this in a moment. But it seemed to me that the  
5 defense was simply hoping to show the periods of incarceration  
6 and prearraignment or pretrial detention to show that he's  
7 familiar with what it's like in jail; and assertions of this  
8 being shocking, new, and totally uncharted territory are  
9 false or overstated. I think it kind of depends on what  
10 Mr. McCaffrey is going to say about that. And maybe he's not  
11 going to say anything about that and it's not coming in.

12 Mr. Larkin.

13 MR. LARKIN: One question. The way we read the case  
14 is if the plaintiff is seeking damages for incarceration, in  
15 and of itself that would be enough, I think --

16 THE COURT: Wait a minute. So your view is that a  
17 person who is wrongly convicted should get less damages if he's  
18 been there before than a person who has never been there  
19 before, per se?

20 MR. LARKIN: That's a cold way to put it, very cold  
21 way to put it. But I think the cases recognize that, don't  
22 they; that if you are in prison and you are seeking damages for  
23 denial of liberty and you have been in prison on other  
24 occasions, and even if the time period that you're in for and  
25 you're seeking damages for is just 48 hours or 72 hours, the

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1 courts generally allow some cross-examination just as to  
2 periods of incarceration.

3 THE COURT: I think I want to reserve on this to hear  
4 what the direct is like. And if we have to then have a quick  
5 sidebar to talk about the parameters of cross, we can. But I  
6 think -- I think the mere fact that somebody has been in jail  
7 before doesn't mean that their damages should per se be less  
8 than a novice.

9 MR. LARKIN: On an intuitive level, I hear what the  
10 Court is saying. The cases though --

11 THE COURT: Well, the cases give me a whole lot of  
12 discretion to decide what's prejudicial --

13 MR. LARKIN: Yes.

14 THE COURT: -- what's probative. So I'm not too  
15 worried about my ability to rule on this. And I guess what I'm  
16 saying is that if it's relevant, I'm going to allow it. But  
17 it's not clear to me why it's really relevant. If it's just  
18 really being offered to show that he's a bad guy who has been  
19 in jail before and so: No harm, no foul; if he didn't commit  
20 this one, he must have committed something else that was  
probably just as bad.

22 MR. LARKIN: That won't be the argument.

23 THE COURT: Well it won't have to be the argument. I  
24 think the concern is that that will be what the jury will infer  
25 or surmise as the point, and I don't want to go there. So if

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1       they open the door to the horrors of prison and what it's like  
2       for a person being there, bring out the violins, then I think  
3       it might be fair game at that point to say: Wait a minute  
4       here. This was not quite as dramatic as you portray it because  
5       you've been there before, and you've been there since, and this  
6       is sort of camp for you. Maybe. I think it's going to really  
7       turn on what Mr. McCaffrey says on the stand.

8                    MR. LARKIN: Would that be true even given the extent  
9       of Mr. McCaffrey's prior arrest history. We've got 18 or 20  
10      arrests. We've got multiple stints in jail, in prison.

11                  THE COURT: What is the argument there? The argument  
12      is that people with long criminal histories can be wrongly  
13      convicted --

14                  MR. LARKIN: No.

15                  THE COURT: -- for crimes they didn't commit.

16                  MR. LARKIN: Absolutely not.

17                  THE COURT: And if they are, certainly the price is a  
18      lot lower than for people who previously had law-abiding  
19      existences?

20                  MR. LARKIN: As to the first part, of course the  
21      answer is no. Of course not. If somebody was wrongfully  
22      convicted and should not be in prison, there is no question  
23      about that.

24                  But in terms of sizing up the damages. If you have  
25      John Smith who has never been arrested in his life and he's

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1 arrested and charged with a crime, a felony, and is found  
2 guilty, and he didn't do it, and he goes to prison, and this is  
3 his first time in custody. And you have Bill Smith who has  
4 been arrested 20 times and who has been in jail or prison for  
5 periods of seven months, four months, ninety days, five days,  
6 ten days, and now currently, as we just found out, I think the  
7 damages -- the damages, just the damages; not liability but  
8 just the damages; liability depends on a whole different set of  
9 arguments -- but just the damages are lower. I think most of  
10 the courts come down that way. Although of course, as your  
11 Honor says, it's a matter of discretion.

12 THE COURT: I think there's a real concern and I  
13 have -- I have this concern and I think Mr. Garber and  
14 Mr. Cohen do as well, that the takeaway from this is not going  
15 to be that the damages are lower because it was less traumatic  
16 for him than it might have been for some first-time convict,  
17 but that: No harm, no foul because this guy is a bad guy and  
18 so don't worry about it. If he was wrongly convicted on this  
19 one, it just -- the law of averages would make this not a big  
20 deal.

21 MR. LARKIN: Well, we would never make that argument.

22 THE COURT: I know you're not going to make that  
23 argument. That's the concern. That's the prejudice that may  
24 flow.

25 MR. LARKIN: I understand.

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1                   THE COURT: So I want to be very, very careful about  
2 that. So I'm going to reserve until I've heard what the direct  
3 is on this. And then I think we'll have to revisit, probably  
4 before the cross, or before you introduce this other evidence.  
5 So don't open on it.

6                   MR. LARKIN: Understood. Thank you.

7                   THE COURT: Okay.

8                   The next one is a motion to preclude plaintiff from  
9 referring to the city of New York or referring to defense  
10 counsel as the city attorneys or attorneys for the city and any  
11 reference to indemnification by the city.

12                  I think that's fair. The city is no longer a  
13 defendant. They are just going to be defense counsel, counsel  
14 for the defendants.

15                  The next motion is a defense motion to permit the  
16 defendants' witnesses to testify about statements made by  
17 Pujols and Sosa on other occasions about what the witnesses  
18 said on the night of the crime or later.

19                  I'm still scratching my head and trying to figure out  
20 why this is relevant. What are you trying to introduce here?  
21 You're trying to introduce out-of-court statements to show  
22 what?

23                  MR. LARKIN: This is actually before the recent  
24 discussion --

25                  THE COURT: So you're not looking to do this anymore?

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1                   MR. LARKIN: If the witnesses admit that on prior  
2 occasions they have told -- told others that they either had  
3 conversations among themselves not to discuss the fight or they  
4 had a conversation with detectives, one or more detectives not  
5 to discuss the fight but they couldn't remember which one, then  
6 I may not need the testimony of Mr. Krutoy to talk about that.  
7 I think Shanda Strain is different because she's going to  
8 testify about a very specific lie that the girls -- the women  
9 told, demonstrating that, in fact, they decided amongst  
10 themselves not to say anything about this fight, your Honor.  
11 And that relates to the note that's in the file concerning the  
12 alleged carjacking. And so that -- I think that's very  
13 important to show.

14                   THE COURT: These witnesses are going to testify,  
15 right? Certainly Pujols is going to testify.

16                   MR. LARKIN: Pujols is going to testify.

17                   THE COURT: So why shouldn't she be crossed on her  
18 prior inconsistent statements?

19                   MR. LARKIN: She will be.

20                   THE COURT: So depending on what she says, the fact of  
21 a prior statement through another witness might be introduced  
22 because it's not collateral and it's germane, but --

23                   MR. LARKIN: Or it might not be. It might not need to  
24 be at all.

25                   THE COURT: It seems to me it's hard to imagine why it

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1 will be necessary to call these witnesses when Pujols and Sosa  
2 themselves are going to be taking the stand.

3 MR. LARKIN: They are. But I think with respect to  
4 ADA Strain, that one very specific issue is very important,  
5 your Honor. Because here's the chain of events. The women --  
6 they go out that night. Ms. Peguero, the victim, meets  
7 Mr. McCaffrey.

8 THE COURT: Right.

9 MR. LARKIN: They drive around in the van. The women  
10 meet up again with Ms. Peguero. She tells them -- she's  
11 disheveled. Her belt buckle is undone. Her mascara is a mess.  
12 She is crying. She tells them she was raped.

13 They get into this -- they get into some kind of  
14 altercation in the car where, according to Maria Sosa, somebody  
15 broke the windshield during that altercation. They go to  
16 New Jersey. And on the way to New Jersey, Ms. Peguero says she  
17 was raped.

18 My God. The women are shocked and they go to a  
19 hospital. They take her to the hospital. And the detective is  
20 there. And Ms. Peguero and/or one of the other women told this  
21 detective that there had been a carjacking.

22 THE COURT: Peguero or Pujols?

23 MR. LARKIN: It was probably Peguero. But the  
24 information we have is that our detectives, the New York  
25 detectives, Detective Diaz got a phonecall from Detective Rak.

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1 Detective Rak told him: There was a crime in your  
2 jurisdiction. Here's what happened. There was a carjacking.  
3 Three Hispanic men, one of them broke the windshield of the  
4 car.

5 So Detective Rak is relaying a story to the New York  
6 detectives about how the windshield got broken that she got  
7 from these -- from these women who had told her this story  
8 about how the windshield got broken. So they were trying to  
9 cover up the fight from the very beginning before they even  
10 spoke to the New York detective.

11 They decided, your Honor, amongst themselves -- and it  
12 was probably Ms. Peguero who did it -- that they were not going  
13 to say anything about this fight. And it's clear from the  
14 get-go. Because they were making up stories to explain the  
15 broken windshield, even though they knew that the fight had --  
16 that the fight itself is what caused that broken windshield.

17 So they gave false information to the New Jersey  
18 detective, which was in turn relayed to the New York detective.  
19 And it's a note in the file about the broken windshield.  
20 Supposedly being caused by a carjacking. It wasn't caused by a  
21 carjacking. Ms. Sosa admitted at her deposition that the fight  
22 in the car caused the broken windshield.

23 So they themselves decided that they were going --  
24 that they were going to not say anything about this fight.  
25 This is what I think happened.

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1                   THE COURT: I'm not sure why you need these extra  
2 witnesses. So presumably -- the witnesses who made the false  
3 statements are going to be on the stand and are going to be --

4                   MR. LARKIN: Right.

5                   THE COURT: Not Peguero but -- right? Peguero is not  
6 going to be testifying?

7                   MR. LARKIN: No, no.

8                   THE COURT: But the others are going to be here.  
9 They're going to be examined. They're going to be crossed.  
10 They are then going to be confronted with these prior  
11 statements, false statements. They'll admit or they'll deny.

12                  MR. LARKIN: Right.

13                  THE COURT: The defendant, Diaz, is going to testify  
14 and he's going to say what he learned and what he did as a  
15 result of what he learned.

16                  MR. LARKIN: Exactly.

17                  THE COURT: So --

18                  MR. LARKIN: The only reason that Shanda Strain is  
19 relevant is because after the investigation is concluded and  
20 they're preparing for trial, Ms. Strain spoke to the women  
21 about this note in the file. And they again said at that time  
22 to her the -- there was a carjacking and that's what caused the  
23 broken windshield. So, she couldn't remember -- Shanda could  
24 not remember which of the three told her that. But she  
25 specifically testified at deposition that when she saw the note

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1 in the file she followed up on it with the women. And after  
2 the -- they had met the detectives, after the detectives are  
3 finished with their investigation and turned over the case to  
4 the D.A.'s office now the women are continuing to advance the  
5 story about this carjacking causing the broken windshield.

6 THE COURT: But I think all of this turns on what  
7 these witnesses say on the stand. And so if these are  
8 statements that are prior inconsistent statements, then I think  
9 they might be coming in.

10 If they are prior consistent statements, then they  
11 would only be coming in for -- if other conditions are met.

12 MR. LARKIN: That's right. That's right.

13 They're not for their truth, though. They're for the  
14 fact of the lies being told and demonstrating the chronology,  
15 showing that it's independent of any involvement by these --

16 THE COURT: Well the fact of the statement is what  
17 you're saying. Whether it's a lie or it's the truth is  
18 ultimately I guess for the jury to decide. But unless there's  
19 a dispute about the fact of the statement being made, I don't  
20 see why we need to have third parties in here to do that.

21 MR. LARKIN: So if the -- I'm sorry if I'm belaboring  
22 this, your Honor. But if Pujols and Sosa are on the witness  
23 stand and they're asked questions about what they said  
24 concerning the carjacking and they both deny it, would we then  
25 be permitted to call Shanda Strain to testify --

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1                   THE COURT: Well you'd certainly permitted to cross  
2 them on prior statements, right?

3                   MR. LARKIN: That's right. I'd cross them on the  
4 prior statements. Did you ever tell --

5                   THE COURT: Confront them with the prior statement to  
6 Strain. Allow them an opportunity to deny, admit or explain.  
7 And then depending on how they do that, then maybe you'll be  
8 able to call this other witness to establish the fact of a  
9 statement which wouldn't be offered for the truth.

10                  MR. LARKIN: Right.

11                  THE COURT: Unless it's collateral.

12                  Now, it doesn't sound to me like it's collateral. And  
13 I'm not sure what the plaintiff's view on this is, but we're  
14 sort of playing a chess match three steps ahead and it's not  
15 clear to me what the moves before this are going to be.

16                  MR. LARKIN: I'm sorry. I don't mean to belabor it,  
17 your Honor. I'm just trying to think ahead as to what might  
18 happen at trial. That's why I'm raising it.

19                  THE COURT: Mr. Garber, Mr. Cohen, do you want to  
20 respond.

21                  MR. GARBER: I think this is going to turn on how  
22 their testimony is going to come out, Pujols an Sosa, and  
23 whether or not Strain would be relevant to prove up something.  
24 But it's kind of a double-edged sword. If they told Strain,  
25 look, you know, we buried this, you know --

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1                   MR. LARKIN: That's not what they said to Strain.  
2 What they said to Strain is there was a carjacking.

3                   THE COURT: Your point is that what was said to Rak  
4 and passed on to the defendants is the same as what was said to  
5 Strain.

6                   MR. LARKIN: Yes.

7                   THE COURT: Years later.

8                   MR. LARKIN: Correct. Exactly.

9                   THE COURT: Which reflects then that there was never a  
10 revelation. There was always a coverup. And it wasn't -- the  
11 revelation didn't occur until well after the trial. That's  
12 your point. I get that.

13                  MR. LARKIN: Yes.

14                  THE COURT: Not clear to me though that it comes in  
15 automatically. I think we've got to see what their testimony  
16 is on the stand. If they admit that they never told a soul  
17 about the coverup until after the trial, then I assume you  
18 don't need to call these other people, right?

19                  MR. LARKIN: Yeah. It depends on how -- on what they  
20 say.

21                  THE COURT: Well I think it depends on what they say.  
22 I agree with that.

23                  MR. GARBER: We'll see how this plays out. This may  
24 tie into though the failure-to-investigate issue.

25                  THE COURT: We'll get there.

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1 MR. GARBER: Yes.

2 THE COURT: So, I think -- we'll have to see how this  
3 plays out.

4 So I think that's all of your motions in limine,  
5 Mr. Larkin, right?

6 MR. LARKIN: I believe so.

7 THE COURT: Other than your letter, other than your  
8 most recent letter.

9 MR. LARKIN: That is correct, your Honor.

10 THE COURT: So then we go to plaintiff's motions in  
11 limine. Plaintiffs look to preclude the defendants from  
12 introducing plaintiff's prior criminal convictions. This is  
13 the convictions themselves. There are a lot of them. I think  
14 the rule is very clear that really old and convictions that are  
15 not for felonies and have nothing to do with truthfulness and  
16 veracity shouldn't be coming in. So that takes care of most of  
17 them. So maybe I should ask Mr. Larkin which ones are you  
18 trying to get in.

19 MR. LARKIN: Well this would come in for two reasons  
20 in our view. First of all, the most recent one for criminal  
21 possession, I think, of a weapon which we raised in our letter  
22 would go to credibility.

23 THE COURT: That's the current --

24 MR. LARKIN: Yes.

25 THE COURT: The conviction that is -- 2013, I guess,

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1 right?

2 MR. LARKIN: Yes. July of 2013, your Honor.

3 THE COURT: Let's start there. Seems to me that meets  
4 all of the requirements under the rule. I think that one's  
5 coming in, Mr. Garber. Do you disagree?

6 MR. GARBER: I don't know -- it's a weapon possession  
7 charge. There is no deceit associated.

8 THE COURT: Doesn't need to be. If it's a felony  
9 conviction of recent vintage that a jury can consider in  
10 assessing a witness's credibility, that's the nature of  
11 felonies. I think that's -- that's the law.

12 MR. GARBER: My position --

13 THE COURT: You're arguing 403? Are you arguing  
14 something else?

15 MR. GARBER: My understanding was that it doesn't go  
16 to deceitfulness -- maybe I'm wrong on this, okay -- it doesn't  
17 come in. You're saying if it's a felony the law is clear that  
18 it comes in.

19 THE COURT: This is a civil -- remember, this a civil  
20 trial. He's not a criminal defendant in this case. He's a  
21 witness in this case. And so his credibility is at issue. And  
22 the fact of the conviction is -- is fair game under certain  
23 circumstances. It seems to me the circumstances have been met.

24 MR. GARBER: I guess what I should say is that if it's  
25 coming in, it should just be regarded as a felony; saying have

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1 you been convicted of a felony and the nature of it. I mean  
2 that it's a weapons possession charge shouldn't come out  
3 because it's going to be -- it's prejudicial under Rule 403. I  
4 think it's going to cause a jury to speculate about violent  
5 nature and I don't think that that's appropriate because it's a  
6 credibility -- he's been convicted of a felony. That's really  
7 all they should hear.

8 THE COURT: What's your response? Why do they need to  
9 know that it was a weapons charge?

10 MR. LARKIN: I think the rule says, and the way the  
11 circuit has interpreted the rule, your Honor, is that if it's a  
12 felony conviction what usually comes in is the statutory -- the  
13 nature of the crime, the description of the crime, the date of  
14 the conviction, and the sentence.

15 THE COURT: Date and sentence are clearly relevant. I  
16 guess the issue is does the nature of the crime pose issues of  
17 prejudice. Does it make the jury to say: If he's running  
18 around with guns, I don't care whether he's been wrongly  
19 convicted of rape.

20 MR. LARKIN: The Courts look at the four-factor test,  
21 your Honor. And I believe we laid that out in our letter but  
22 I'll just briefly, if the Court will just bear with me. If the  
23 crime -- the way the courts seem to analyze prejudice is, is if  
24 a crime is of the same type or --

25 THE COURT: No, I know.

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1                   MR. LARKIN: Similar conduct related at issue. I  
2 think it has nothing to do with the claim at issue here. So  
3 there is no concern that the jury might see a propensity in the  
4 sense that they would -- if this were an excessive force case  
5 for instance and if it was --

6                   THE COURT: It's not a propensity issue, I think.

7                   MR. LARKIN: It's not.

8                   THE COURT: I agree with you. The cases typically are  
9 focused on propensity, and that's an impermissible basis for  
10 introducing things and so that has to be guarded against  
11 carefully.

12                  But I think the separate inquiry is whether the crime  
13 itself is sufficiently heinous as to get a jury worked up and  
14 that they would be prejudiced against the witness for reasons  
15 that would be beyond what would be permissible, right?

16                  The concern is that they will just say: Enough. I  
17 don't care whether this guy was wrongly convicted. I think he  
18 was wrongly convicted but I'm going to rule against him because  
19 I don't like people who have guns.

20                  MR. LARKIN: Obviously, again, I appreciate what the  
21 Court is saying, that that could be an unintentional takeaway  
22 although it's never -- that's certainly not an argument we  
23 would ever make.

24                  THE COURT: I wouldn't let you make it, but the  
25 concern is that the jury will get there on its own. So usually

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1 a limiting instruction is what would fix these, and I think  
2 juries are generally pretty good at following limiting  
3 instructions. So I think I will at the least give a limiting  
4 instruction saying you've heard testimony that Mr. McCaffrey  
5 has a conviction, a felony conviction. You may consider it for  
6 the following reasons. But you may not use that information  
7 for this reason. Or you may not draw this inference from it.

8 MR. LARKIN: There's two -- I'm sorry, your Honor.

9 THE COURT: Go ahead.

10 MR. LARKIN: If I may.

11 We had -- the circuit, I believe, states that the  
12 presumption is that all felonies are somewhat probative and  
13 that in general the presumption is the nature or the statutory  
14 name of each offense, the date and the sentence imposed is  
15 presumptively required by the rules subject to the balancing  
16 test.

17 THE COURT: I'm talking about the balancing test.

18 MR. LARKIN: In Estrada I think the court emphasized  
19 that it's important for the jury to know what the crime is in  
20 order to assess its relevance for credibility purposes. And I  
21 think in this case, if I can just move to, I guess, subpart (b)  
22 of my letter, your Honor. And forgive me for sending it in  
23 yesterday, but we only learned about this a short time ago.

24 THE COURT: Let's stop. Why was this not revealed  
25 sooner, Mr. Garber? I'm puzzled by this. This would seem to

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1 be part of your continuing obligation to disclose these things.

2 I mean I just learned about it. I mean I knew that  
3 your client was in custody. It wasn't clear to me what for --  
4 because I writted him over here. But I was surprised that  
5 Mr. Larkin wasn't aware of this and that you hadn't disclosed  
6 it to him.

7 MR. GARBER: I was surprised. We gave a release. And  
8 in my December letter I said he landed back in jail. When  
9 Mr. Larkin sent me an e-mail last week saying, you know, well  
10 what's going on, when we put the order to produce in, I called  
11 and left two messages for him. We have not been communicating.  
12 So I guess I should have turned it over sooner. But I mean I  
13 have. He's got it. So, I didn't realize I had an obligation  
14 to say hey, by the way, my client is now in jail and this is  
15 what it's for. I just assumed he would be doing his work.  
16 He's got the NYS and he's got the release.

17 MR. LARKIN: What's strange is that Mr. Garber went  
18 through every other conviction in his motion papers, knowing  
19 that his client had just been convicted of a felony, and argued  
20 why all of these other convictions were not admissible. Never  
21 told us about --

22 THE COURT: I was puzzled.

23 MR. LARKIN: I found that to be of some concern.

24 MR. GARBER: I was responding to the documents that he  
25 had in the JPTO, so.

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1                   THE COURT: This is clearly coming in. It seems to me  
2 a weapon possession charge is not as inflammatory as some other  
3 charges. So I think the name of offense is not going to cause  
4 the jury to lose its mind, and I will certainly consider a  
5 limiting instruction if you want to propose one, Mr. Garber.

6                   MR. GARBER: Okay.

7                   THE COURT: But I intend to give that instruction  
8 generally as to what the jury can use prior convictions for  
9 which I think will have built into it a limiting instruction.  
10 So that's what I intend to use. Okay.

11                  Now there are other convictions. So what other  
12 convictions are you seeking to introduce?

13                  MR. LARKIN: Before we get to that, your Honor, may I  
14 just address the statements that we learned about?

15                  THE COURT: No. I want -- we'll get to those next,  
16 because I don't think that's the same thing.

17                  So right now I'm really dealing with their motions in  
18 limine to preclude the introduction of evidence about prior  
19 convictions. I'm allowing the 2013 conviction in.

20                  What other prior convictions are you seeking to  
21 introduce?

22                  MR. LARKIN: None of the others will fit within the  
23 criteria for credibility. We agree with that, your Honor.

24                  But I think it will depend on damages and the kind of  
25 testimony that would come in about damages. I think that some

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1 of the prior convictions -- we've got the time of incarceration  
2 which we've discussed with the Court and also the nature of the  
3 crimes. If Mr. McCaffrey presents himself as a meek -- I don't  
4 want to -- I mean --

5 THE COURT: Meek, what?

6 MR. LARKIN: I've heard some suggestion that he may  
7 testify that as a -- as a person convicted of rape he was  
8 forced to stand -- he couldn't do certain jobs, he was forced  
9 to sort of keep to himself. He was intimidated, in other  
10 words, by the prison environment. Some of these other  
11 convictions tend to cast doubt on that kind of presentation, if  
12 you will.

13 THE COURT: Let's reserve on that. Because I think  
14 that really goes to the point we talked about before.

15 MR. LARKIN: Yes. I would agree.

16 THE COURT: And Mr. Garber is going to flesh out what  
17 he intends to elicit from his client which will make it easier  
18 I think to resolve these issues.

19 MR. LARKIN: Yes, your Honor.

20 THE COURT: So the 2013 conviction though is coming in  
21 and you're not seeking to introduce any other convictions.  
22 What you're talking about really is introducing other jail  
23 stints and I guess other --

24 MR. LARKIN: Other acts.

25 THE COURT: Other conduct, other acts that would belie

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1 testimony about him being a meek wallflower.

2 I don't know. I think it's unlikely that I'm going to  
3 allow those in.

4 MR. LARKIN: It would depend on how Mr. McCaffrey  
5 testifies about his experiences in prison. He's going to lead  
6 the jury to believe that he was victimized in certain ways that  
7 may or may not be -- that may open the door, I submit  
8 respectfully, with respect to some of his prior conduct.

9 THE COURT: Let's hold off on this.

10 MR. LARKIN: That's my concern.

11 THE COURT: No other convictions are you seeking to  
12 introduce for purposes of 609?

13 MR. LARKIN: Correct. There's only the one  
14 conviction. No other convictions.

15 THE COURT: All right. So the next motion --

16 MR. GARBER: Let me just raise something.

17 THE COURT: Go ahead.

18 MR. GARBER: I guess I wasn't sure or clear about my  
19 continuing obligation. He also was convicted of an assault in  
20 the second degree.

21 THE COURT: When?

22 MR. GARBER: This is the same time that he pled on the  
23 criminal possession of a weapon charge.

24 MR. LARKIN: I have the certificate of disposition for  
25 a criminal possession of a weapon.

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1                   THE COURT: Let him finish.

2                   MR. LARKIN: I also saw another docket number -- and I  
3 think I dropped a footnote, your Honor -- when I reviewed the  
4 file, I saw another docket number of another case and I  
5 requested that file as well. I don't have that allocution.

6                   If Mr. Garber has the allocution and he can send it to  
7 us, it might solve some of these issues because my  
8 understanding is it's a CPW in the second degree, which is a C  
9 felony. And I have one certificate of disposition for that  
10 crime. And the plea was July 30, 2013. I don't have a  
11 certificate for an assault.

12                  MR. GARBER: Let me help him out though. I can tell  
13 you.

14                  It's that. And the certificate of disposition is  
15 wrong. It's actually three-and-a-half years, not three years.  
16 And it's kind of weird that it says three.

17                  And there was an assault charge also that he pled to;  
18 got a year on it, which merged with it; and an aggravated  
19 unlicensed driving. So he actually wrapped up three cases at  
20 the same time.

21                  And you can call me I'll share with you what I have.

22                  THE COURT: So let's do that.

23                  MR. GARBER: Okay.

24                  THE COURT: It seems to me you have an obligation at  
25 this point to let them know about prior convictions and it

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1 seems to me that Mr. Larkin has an obligation to let you know  
2 about his client's CCRB complaints that have been substantiated  
3 and so if there are any then you should let him know those.

4 MR. LARKIN: We absolutely will and there's -- I mean  
5 these guys are very clean; 20, 25 years, nothing.

6 THE COURT: In any event those are -- I think those  
7 are the running rules. So, talk. Make sure that there's  
8 nothing that hasn't been shared and that may then affect what  
9 you're seeking to introduce on cross.

10 So certainly the gun possession I think is coming in.  
11 The other charges sounds like they were part of the same  
12 conviction basically.

13 MR. GARBER: Yes.

14 THE COURT: I think they're probably coming in as  
15 well. But talk and see whether that's what you want to do,  
16 Mr. Larkin, and whether there's an objection to some but not  
17 others of the convictions in 2013. All right?

18 MR. LARKIN: Thank you, your Honor.

19 MR. GARBER: The assault was a different incident.  
20 But it was wrapped up the same time at sentencing.

21 THE COURT: I assume Mr. Larkin is going to want to  
22 get them in. If he is going to want to get them in and you  
23 have an objection to one but not the other.

24 MR. GARBER: And also same on prejudice, which is that  
25 the name of the conviction, obviously, shouldn't come in;

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1 which, the weapons possession charge you were teetering on  
2 that, so.

3 THE COURT: But, again, it's a different standard in a  
4 civil case. And so think about it. Think about whether you're  
5 asking for a limiting instruction; and if so, what sort of  
6 limiting instruction you're asking for. All right.

7 The next defense motion is to preclude the defendants  
8 from calling Rak and Farkhanda Farooqui, Lisa Miner, Evan  
9 Krutoy, Carlos Vargas, and Shanda Strain.

10 So I guess we've really probably covered this. I  
11 think it turns on the testimony of Pujols and Sosa. But is  
12 this different -- is this just the flip side of Mr. Larkin's  
13 motion or is there more to it?

14 MR. GARBER: I guess this goes back to the threshold  
15 question I was grappling with in the beginning here is for our  
16 presentation we believe we're entitled to use the trial  
17 transcripts because the jury has to measure the alleged Brady  
18 violation against what happened at this trial. So we don't  
19 think any of the trial transcripts are inadmissible.

20 THE COURT: I'm not there yet. That's your next  
21 motion.

22 MR. GARBER: That's, I guess, why I'm objecting to Rak  
23 and Farooqui. Because I think what Mr. Larkin is saying is  
24 that we will prove up what happened at that trial through live  
25 witnesses.

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1                   THE COURT: I don't think that's what you're saying.

2 Is that what you're saying?

3                   MR. LARKIN: Your Honor, since the Poventud decision  
4 came down, and I've sort of had to rethink how we would wind up  
5 presenting the case, I think as long as we can put in the trial  
6 testimony of those witnesses, we won't need to call them live  
7 to testify.

8                   THE COURT: Put it in for what purpose?

9                   MR. LARKIN: It would be to demonstrate the evidence  
10 that was before the jury the first time.

11                  THE COURT: With respect to prejudice, you mean?

12                  MR. LARKIN: With respect to prejudice. So that this  
13 jury could assess whether there was any prejudice in the first  
14 trial by reason of the omission.

15                  THE COURT: Let's then hold off on this one, this  
16 motion and get to, I guess -- it's not really your motion in  
17 your motions in limine. This came up in your letter,  
18 Mr. Garber. I don't think you made -- you made a motion in  
19 limine to include in transcripts and grand jury testimony until  
20 your April 16 letter, right?

21                  MR. GARBER: No. In my motion in limine I did address  
22 the issue of using trial transcripts for our presentation. And  
23 I raised it again because there was no ruling on it. That's  
24 why it's in my letter of yesterday.

25                  THE COURT: There was no ruling -- I mean I haven't

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1 ruled on any of the motions.

2 MR. GARBER: Well there were some rulings that you had  
3 made. It was just an outstanding issue that I -- I reraised I  
4 think a little bit more specifically in my letter of yesterday.

5 But it's on the table now and I guess it's, you  
6 know -- let me just back up a bit. On the preclusion, have  
7 you -- are you basically going to wait and see how it goes with  
8 Pujols and Sosa before you decide whether or not Krutoy, you  
9 know -- I guess Strain we talked about -- but Krutoy, Carlos  
10 Vargas and Rak and Farooqui come in? Is that how you left it?  
11 I just want to make sure.

12 THE COURT: The defense motion didn't include all of  
13 those names. It included some of them. And it seems to me  
14 that most of it turns on what the testimony of Pujols and Sosa  
15 is because to the extent that they acknowledge that they never  
16 told anybody about something, it's unclear to me why it's  
17 relevant to have other people say, yeah, they never told me  
18 about that, unless it's been put in issue. So that's why I  
19 think we can hold off on that.

20 MR. GARBER: Okay.

21 THE COURT: So, I think that we've got that covered.

22 Now the issue that came up in your April 16 letter is  
23 the admissibility and use of transcripts from the criminal  
24 trial as well as the Peguero perjury testimony, the testimony  
25 in the perjury grand jury from Peguero. I'm trying to figure

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1 out what exactly the parties contemplate is going to go to the  
2 jury on this. Because one of the other issues that is raised  
3 in your letter is that plaintiffs should be allowed to prove --  
4 plaintiffs should be allowed to prove that he was exonerated  
5 based upon actual innocence. And so I guess I'm a little  
6 confused as to what -- what's going to be offered to the jury  
7 as a stipulated fact.

8 It seems to me the stipulated facts are that he was  
9 arrested, charged and convicted and sentenced for a rape; that  
10 the complaining witness recanted, acknowledged that it was  
11 false, that the defendant -- the plaintiff never raped her;  
12 that the conviction was overturned; and, I guess for good  
13 measure, that the complaining witness pled guilty to perjury.  
14 Right? I mean that's -- it seems to me those are stipulated  
15 facts.

16 MR. LARKIN: No dispute.

17 THE COURT: So I'm not sure what more the jury needs  
18 from the initial trial than that. But the issue, I guess, of  
19 prejudice does sort of raise an issue again as to -- they have  
20 to assess the impact of the Brady violation. If they find the  
21 Brady violation happened, they still are asked to find out well  
22 whether it would have made a difference. So then I think it  
23 gets a little tricky.

24 Are we giving them the whole trial transcript? Are we  
25 going to ask them to just wallow through the trial and figure

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1 out whether the conduct of the defendants, if it happened --

2 MR. LARKIN: No.

3 THE COURT: -- was prejudicial?

4 MR. COHEN: Your Honor --

5 THE COURT: Let's give Cohen a chance. I haven't  
6 heard from him. I miss him.

7 MR. GARBER: I'm going to step out.

8 Let's take a break for a minute.

9 MR. COHEN: Your Honor, also I ought to let you know,  
10 I have another matter I have to be at in the other building at  
11 noon. I can get there a few minutes late. I'd like to address  
12 this point.

13 THE COURT: Before -- address this point and then  
14 we'll take a break.

15 MR. COHEN: I just want to make it clear what our  
16 position is with respect to what we have -- what the  
17 constitutional violation is and the result that we think would  
18 adhere because of it.

19 If, in fact, the jury determines -- I mean it's a  
20 given that they were state actors so that's not a problem --  
21 but if, in fact, the detectives -- if they find that the  
22 detectives did suppress the Brady -- suppress evidence which  
23 you've said was Brady material, then we've proven that there  
24 was an unfair trial regardless of what the jury at the criminal  
25 trial may, in fact, have done with the evidence if they had

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1 received it; that is, whether there would have been an  
2 acquittal, whether it would have been a hung jury, whether  
3 there still would have been a conviction. Because it would  
4 have been an unfair trial. That is a trial in which you don't  
5 have confidence in. The verdict would not be competent. But  
6 they may have heard the evidence and come up still a  
7 conviction. It's quite possible. There's still the violation.  
8 The jury would then be -- I don't know, we believe that your  
9 Honor should instruct them that if they find that the  
10 detectives did what -- did not do what we said or did violate  
11 his constitutional -- Mr. McCaffrey's constitutional rights,  
12 the trial was not fair and they find for the plaintiff.

13 The next issue is if, in fact, the jury determines,  
14 based upon the evidence at the trial that, in fact, the  
15 suppression of this evidence actually resulted in a conviction  
16 when it might not have -- when it shouldn't have been a  
17 conviction, then we're talking about something beyond just, as  
18 the cases say, nominal damages for a violation of your right to  
19 a fair trial. And then we're talking about significant damages  
20 based upon the fact that their actions caused him to spend  
21 years in prison. So, I don't think it's a situation where even  
22 if the jury thinks: Well, I don't -- we're not sure if it  
23 would have affected the criminal trial jury, they still could  
24 find that his right to a fair trial was violated and the  
25 verdict should be for the plaintiff.

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1                   THE COURT: I'm just trying to figure out what the  
2 parties are looking to introduce from the trial record in the  
3 criminal case.

4                   MR. COHEN: It seems to me, your Honor, I think the  
5 jury, once the jury determines that, in fact, it was an unfair  
6 trial, their next issue is what are the damages. And the only  
7 way to assess that is to determine if the constitutional  
8 violation which they have already found would have resulted  
9 in -- caused him to spend years in prison. And the only way  
10 they can determine that is by seeing what the other evidence  
11 was at the trial.

12                  THE COURT: What does that mean? So we're going to  
13 give them the entire trial transcript? We're going to give  
14 them all the exhibits?

15                  MR. COHEN: We're not sure of that yet. We're going  
16 to go through it all and see. But this certainly can't be done  
17 in a vacuum.

18                  THE COURT: We're a week away from the trial.

19                  MR. COHEN: That decision has to be informed by what  
20 at least some of the other evidence was.

21                  MR. GARBER: They have to --

22                  THE COURT: That still doesn't tell me what it is  
23 you're trying to introduce.

24                  MR. GARBER: Okay. The jury is going to be called  
25 upon to say, look, if you believe that the --

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1                   THE COURT: I get what the jury is going to be called  
2 on to do.

3                   What are you trying to introduce? What do you want to  
4 introduce? Just this whopping big transcript?

5                   MR. GARBER: No, no. In fact, I've said in my filings  
6 that's exactly -- we don't want to do that.

7                   THE COURT: What do you want?

8                   MR. GARBER: We want excerpts. So we want them to  
9 know what this trial was about. We want them to know how weak  
10 the evidence of guilt was in this case.

11                  THE COURT: So you're going to call a witness who is  
12 going to tell them that the evidence was weak?

13                  MR. GARBER: No. No. No.

14                  THE COURT: What are we talking about?

15                  MR. GARBER: The testimony of -- portions of the  
16 testimony of Peguero; what witnesses testified to; the  
17 significance of the bite mark to the jury at that first trial.  
18 It was argued on summation by both parties. And that's really  
19 where the case came to a head. And they should understand --

20                  THE COURT: But this sounds like a summation, I mean.  
21 So I'm asking: What are you trying to introduce?

22                  MR. GARBER: I think that there will be excerpts.

23                  MR. LARKIN: Plaintiff has not told us which portions  
24 of the trial they want to rely on. I have a pretty good idea  
25 of what we would want to rely on. I think we would want to

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1 introduce, for example, the portions of Peguero's testimony  
2 where she described the bite mark; most of her direct  
3 examination, which the jury found compelling. I think we would  
4 want to introduce Delacruz who was the garage attendant.

5 THE COURT: Let me stop you just because all of that  
6 makes sense. But it seems to me you folks have got to huddle  
7 up and figure out --

8 MR. LARKIN: Exactly.

9 THE COURT: -- what it is you agree should be coming  
10 in and how it ought to be coming in, and what you don't agree  
11 on, and then I'm going to have to resolve that.

12 MR. GARBER: That's fine.

13 THE COURT: Clearly the jury is going to have to hear  
14 something about what happened at this trial and what the trial  
15 was about to assess whether there was a Brady violation which  
16 includes prejudice; and if they find that, then to assess  
17 damages. Seems to me that they're going to have to have  
18 something about the trial.

19 Now I guess there are ways you can do it where you  
20 just say they can have it all, jury instructions and  
21 everything. But I don't think that's a real efficient way to  
22 do it.

23 MR. GARBER: But why -- I'm not sure why the Court  
24 thinks we want to do that.

25 THE COURT: I'm not sure.

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1 MR. GARBER: We want to streamline this.

2 THE COURT: My point is I don't know what the hell you  
3 want to do. All right. You've told me you want to do a  
4 PowerPoint and whistles and songs. I don't care. I need to  
5 know what it's going to be. He needs to know what it's going  
6 to be. So you guys have got to huddle up and let me know what  
7 it is.

8 MR. GARBER: That's fine. No problem.

9 THE COURT: That's my point.

10 MR. LARKIN: Can I make a request, your Honor. If  
11 plaintiffs can get us by Monday the portions of the trial they  
12 want to designate we can get there -- we can get designations  
13 to them by Wednesday or even by Tuesday. And we can then  
14 figure out what it is.

15 THE COURT: That's what you're going to have to do.  
16 We have a trial that starts a week from Monday.

17 MR. LARKIN: We can do that. Perhaps -- I believe  
18 your Honor anticipated having us back in.

19 THE COURT: Yes.

20 MR. LARKIN: We could address that issue at that point  
21 and then we'll all be set. We'll be copacetic and we'll know  
22 what's coming in and what's not coming in.

23 THE COURT: It may not be copacetic because there  
24 might be a lot of disagreement. But obviously everybody has  
25 got to give a lot of serious thought as to what exactly is the

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1 jury going to know about that prior trial and what are they  
2 going to have to take with them in the jury room on this. So,  
3 I do want that by Tuesday. Okay.

4 All right. Do you want to take a quick bathroom break  
5 and you can leave if you have to?

6 MR. COHEN: I do. I'm sorry.

7 THE COURT: But Mr. Garber can hold up your end.

8 MR. COHEN: He's done very well so far.

9 Before you I leave, though. Your Honor is going to  
10 have another conference next week, I believe. So I'd like to  
11 be part of that discussion so I can make it.

12 THE COURT: What days were we saying?

13 MR. COHEN: Wednesday is a good day.

14 THE COURT: You gave me a list or something.  
15 Wednesday is the 23<sup>rd</sup>. We could do it 2:00.

16 MR. COHEN: That's fine.

17 MR. GARBER: That's fine. Okay. All right.

18 THE COURT: 2:00 Wednesday. And then what I'd like by  
19 Tuesday at the latest is the exhibits and a more fleshed-out  
20 set of objections to the exhibits and, you know, make sure it's  
21 really only ones that you really object to and have a  
22 snowball's chance in hell of getting -- being sustained on, and  
23 then this trial stuff. Okay. So let's take a quick break and  
24 then we'll resume but I have another matter at 12:15 anyway so  
25 we're going to have to cut this relatively short.

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1                   Mr. Cohen I'll see you soon. So we'll come back here  
2 in about five minutes.

3                   (Recess)

4                   THE COURT: Where we had left off was with your  
5 letter. So the trial, the criminal trial you're going to get  
6 back to me on by Tuesday. Is there something you wanted to  
7 say?

8                   MR. GARBER: I've been talking to Mr. Larkin about it.  
9 We're in agreement it should be a streamlined thing, just to  
10 give the jury a baseline. But the bells -- I'm not a  
11 PowerPoint guy. But the question --

12                  THE COURT: I'm not accusing you of anything. All I  
13 want to know with specificity what it's going to be.

14                  MR. GARBER: This is the question though on that.  
15 Because I'm going to start really digging in this weekend on  
16 how it should be presented. Are you adverse to a PowerPoint as  
17 opposed to binders? I just want it to be something the jury  
18 can see or read and get an understanding. And we'll discuss  
19 amongst ourselves what we think is relevant. There's going --

20                  THE COURT: I'm not adverse to a PowerPoint.

21                  MR. GARBER: Okay. Fine.

22                  THE COURT: It seems to me this ought to be a  
23 stipulation as to what key facts are relevant about that trial.

24                  MR. GARBER: We think that's going to happen.

25                  THE COURT: So they can take a variety of forms. Just

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1 read a stipulation or hand in a written stipulation which is an  
2 exhibit that they can take back to the jury room. A PowerPoint  
3 is fine if the parties can agree to it. My concern is that  
4 there is going to be less agreement than appears today to be  
5 the case and if there's a disagreement we need to resolve it  
6 pretty quick. So by Tuesday you'll tell me what you've agreed  
7 on, what you disagree on.

8 MR. LARKIN: Yes, your Honor.

9 THE COURT: So, I think the rest of the issues that  
10 are teed up in your letter from yesterday Mr. Garber, I want to  
11 give Mr. Larkin a chance to respond to, and he hasn't had that  
12 chance yet. And that includes failure to investigate  
13 information received from Rak, whether that's relevant to this  
14 case and this trial. The next is the false information  
15 forwarded by defendants to the prosecutor and Diaz's alleged  
16 perjury. I think that is relevant. Of course it's hotly  
17 disputed as to whether that happened, I assume. So I'm not  
18 sure -- I'm not sure what exactly you intend to introduce but I  
19 want to give Mr. Larkin a chance to respond. And then the next  
20 thing is that plaintiffs should be allowed to prove that he was  
21 exonerated based upon actual innocence. I've already teed this  
22 up and talked about this and what it means. I think this  
23 really goes to what the jury is going to be allowed to hear  
24 about the underlying trial. If there's more to it than that,  
25 then talk to Mr. Larkin so he knows what he's responding to.

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1 But, for example, the fact that there is a DNA test that  
2 corroborated the recantation of Peguero. I mean that might be  
3 relevant, but I don't know if that opens then the door to a  
4 witness who is going to say that this DNA test wasn't available  
5 at the time that the trial took place and the detectives were  
6 investigating it. So I think -- I want to give Mr. Larkin a  
7 chance to respond.

8 So, Mr. Larkin, I'd like you to respond no later than  
9 Tuesday, sooner if you can, so that we'll tee that up then for  
10 the Wednesday conference as well.

11 MR. LARKIN: Thank you, your Honor.

12 THE COURT: Now your letter raised two points,  
13 Mr. Larkin, your letter from yesterday. I've already ruled on  
14 the 609 issue for the 2013 conviction. I guess I'm going to  
15 hear a little more about whether there are other convictions  
16 that also you're going to seek to introduce. So you're going  
17 to let me know that by Tuesday.

18 MR. LARKIN: Yes, your Honor.

19 THE COURT: The last bit, though, of your letter  
20 relates to the admissibility of the plaintiff's statements when  
21 he was arrested. And Mr. Garber hasn't had a chance to respond  
22 to that. But I'll tell you candidly I can't imagine any  
23 scenario under which I'm going to let that in. It's only a 32.  
24 I meant allegedly. I mean it seems to me that's all  
25 principally designed to show that Mr. McCaffrey is a bad guy

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1 and kind of a thug, and I don't think that's really relevant to  
2 any of the issues at this trial. So, I don't see that coming  
3 in. So don't expect on getting that. Okay.

4 So let's just recap where we -- what we need to do.  
5 What I would like by Tuesday are copies of the exhibits and if  
6 there are objections to the exhibits, a submission explaining  
7 in more than a word or two what the objection is so that I can  
8 be in a position to rule on those on Wednesday.

9 I'd also like the final joint requested charge. I  
10 mean Mr. Larkin -- excuse me Mr. Garber you had talked about  
11 that you guys were still working on some things and tailoring a  
12 couple of instructions. I'd like to have the final joint  
13 requested charge no later than Tuesday. Where there are  
14 disagreements, lay out your respective positions so it's clear  
15 to me where you disagree. You've done that to some extent  
16 already but it doesn't seem like it's final.

17 MR. LARKIN: Not quite. That should be submitted in  
18 Word format, your Honor?

19 THE COURT: Yes. So I can cut, paste, and edit  
20 quickly.

21 MR. LARKIN: Understood.

22 THE COURT: I'd like your agreed-upon and, if there  
23 are disagreements, the respective portions of the trial  
24 testimony from the criminal case that you intend to introduce.

25 And then I also would like a summary of what

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1 Mr. Garber intends to elicit from Mr. McCaffrey regarding his  
2 experience in jail so I can rule on the outstanding issues.

3 So I think that's what I need. I'll issue a short  
4 order that memorializes these requests but I want those by  
5 Tuesday so I can be prepared on Wednesday.

6 So let's say Tuesday at -- by 2:00 I'd like them so I  
7 can then have the evening of Tuesday to prepare for a Wednesday  
8 conference. Good.

9 MR. LARKIN: Yes, your Honor.

10 THE COURT: All right. Anything else we should cover  
11 before I cut you loose? Plenty to do between now and next week  
12 and of course plenty to do between now and a week from Monday  
13 when the trial begins.

14 Jury selection will be pretty straightforward. I  
15 think we'll have eight jurors is my contemplation. Is that  
16 good with everybody?

17 MR. LARKIN: Yes, your Honor.

18 THE COURT: They'll all deliberate. I'll send out the  
19 final voir dire next week so you know what I'm planning to do;  
20 and if you have objections, you can tell me on Wednesday. But  
21 I generally don't make too many changes to what I've put in my  
22 final draft.

23 I think the whole thing shouldn't take too long.

24 Think about whether Mr. McCaffrey wants to be present  
25 if we have sidebars of things. I mean it makes it logistically

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1 tricky. Think about clothing for Mr. McCaffrey.

2 MR. GARBER: Absolutely.

3 THE COURT: The marshals are going to be here. They  
4 will be here discretely. So it creates some logistical issues,  
5 much like it would in a criminal trial. It's not quite the  
6 same problem because a defendant in a criminal trial has  
7 different rights than a plaintiff in a civil trial. But I  
8 think we should do everything we can to avoid highlighting the  
9 fact that Mr. McCaffrey is currently in custody. It may come  
10 out on cross. But, I don't think we should highlight it during  
11 jury selection, certainly. So, think about that.

12 Mr. Garber, how you want to do sidebars and things in  
13 light of the fact that it's hard for Mr. McCaffrey to move  
14 around the courtroom. Often it's the case that the clients  
15 don't generally want to participate in the sidebars very much  
16 but it's his call if he wants to be there.

17 MR. GARBER: Okay.

18 THE COURT: Anything else?

19 MR. LARKIN: Just briefly, your Honor. The two  
20 statements that I had addressed in my letter of yesterday's  
21 date. I suspect that depending on what the testimony is on  
22 direct about his experience in jail might not -- might that not  
23 open up the door?

24 THE COURT: The fact that he made some smart ass  
25 comments to a cop about the gun and the charge?

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1                   MR. LARKIN: The reason being, he's going to talk  
2 about the experience of being in prison and how difficult it  
3 was for him, is what I suspect, and how traumatizing it was and  
4 how difficult it is for him to deal with law enforcement. I  
5 think that is going to be implicit or explicit in his  
6 testimony. And I think that the statements clearly reflect a  
7 very different outlook on things. I think it's much fairer  
8 that the jury hears those statements than that the jury is left  
9 with the impression -- with the contrary impression.

10                  THE COURT: What is the contrary -- because he mouths  
11 off to the cops, they can infer that his time in jail for a  
12 crime he didn't commit was a piece of cake, not such a big  
13 deal, sort of like a day at the Y for you and me? It's not  
14 coming in.

15                  MR. LARKIN: No, of course not.

16                  THE COURT: In any event, I've ruled. So that's not  
17 going to come in.

18                  Now if after he testifies you want me to revisit it,  
19 you can always raise it. I never refuse to ever revisit  
20 anything, but I think it's going to take an awful lot to get me  
21 to change my mind. And I've ruled for now. Okay.

22                  MR. LARKIN: Thank you, your Honor.

23                  THE COURT: Mr. Garber, anything else? You get the  
24 last word.

25                  MR. GARBER: No. I don't need that.

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1                   THE COURT: So get me all that stuff in a timely  
2 manner so that I can be prepared on Wednesday.

3                   MR. GARBER: Very good.

4                   THE COURT: Let me thank the court reporter and if  
5 anyone needs a copy of the transcript you can, of course, take  
6 that up with her but do that later because we've got another  
7 civil matter.

8                   Let me thank the marshals for their time as well.

9                   (Adjourned)

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